Supreme Court, U.S.
FILED

01-77 JUL 11 2001

No. 01-

IN THE

Supreme Court of the United States

MARY ANN HETREED,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee who has been subjected to an unwelcome sexual relationship with an officer of the employer in exchange for job benefits and under threat of having job benefits withheld, has suffered an adverse tangible employment action.

2. Whether an employer can be held strictly liable for actions of an officer who demanded submission to an unwanted sexual relationship with a subordinate in exchange for job benefits (including approval of salary increases, bonuses, promotions, and favorable performance reviews).

3. Whether federal law provides that an award of costs is part of the judgment so that a separate notice of appeal is not required.

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Appendix B — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated May 11, 1999 ..... 6a

Petitioner, Mary Ann Hetreed, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not published, but can be found at 2001 WL 427785. (Appendix A). The opinion of the district court is not published, but can be found at 1999 WL 311728. (Appendix B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ('Court of Appeals') was entered on April 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Hetreed filed her Complaint alleging sexual harassment by an officer of Defendant, Allstate Insurance Company, based upon submission to an unwelcome sexual relationship. Hetreed presented evidence that she was threatened with having job benefits withheld or promised favorable job benefits in exchange for engaging in the nonconsensual sexual relationship with Defendant's officer.

The trial court granted summary judgment in favor of Allstate on the sexual harassment claim, holding that Allstate was entitled to the *Ellerth/Faragher* affirmative defense as a matter of law. The trial court first held that Allstate was

entitled to use of the affirmative defense because Hetreed had not suffered any adverse tangible employment action. The trial court then held that Allstate prevailed on the affirmative defense as a matter of law, despite conflicting evidence on material elements of the affirmative defense.

The Seventh Circuit Court of Appeals affirmed the entry of summary judgment and held that an employee who submits to an unwanted sexual relationship with a supervisor in exchange for job benefits has not suffered any tangible employment action.

Petitioner presented evidence that she was coerced into unwelcome, nonconsensual sexual conduct with her superior McGann as an imposed requirement of her employment. Part of her required employment became the performance of oral sex by and upon her superior, and the submission to vaginal and anal intercourse by him. This coerced sex was abusive and demeaning to Plaintiff. In return, Plaintiff received reasonably appropriate future evaluations, compensation (including bonuses and pay raises), responsibilities, and other job related treatment. In this case the tangible employment action against Plaintiff was her being subjected to sexual acts with her superior as a condition of employment. Plaintiff submitted to unwelcome demands for sex by Defendant's officer because of his authority over her promotions, bonuses, salary, and performance reviews, and the terms and conditions of employment. The acts of the officer of Defendant significantly altered the terms or conditions of Plaintiff's employment.

Two of Petitioner's claims of retaliation went to trial. The trial court entered judgment on the jury verdict in favor of Defendant on February 29, 2000, and awarded costs to Allstate. (C. 198, 214).

Allstate employed approximately 50,000 employees and the harassing officer, George McGann, was one of the highest ranking officers at the time the harassment of Mary Ann Hetreed took place. McGann had supervisory authority over Plaintiff, including promotions, salaries, bonuses, performance reviews, and other terms and conditions of employment.

Plaintiff, Mary Ann Hetreed, was an audit manager and an outstanding employee of Defendant Allstate Insurance Company until the termination of her employment on March 7, 1997.

The approximately sixteen sexual acts that took place over four years were not consensual, and even in the words of McGann, were not an affair. There is no evidence presented other than that the sexual advances by McGann were unwelcome by Hetreed. Indeed, McGann first denied there was any sexual relationship.

McGann later admitted to most of the sixteen incidents over the four years, but claimed that it was Plaintiff who harassed him.

Defendant has not presented any evidence that the sex was mutual and consensual. Indeed, since the principals to the sex (McGann and Hetreed) both assert the sex was non-consensual, it is only Allstate that somehow claims to know more than they. The trial court judge decided the controverted facts on the harassment theory, siding with Allstate, when this was clearly a disputed matter fact for a jury to decide.

The trial judge effectively gutted the heart of Plaintiff's allegations, leaving her with two isolated retaliation matters for trial, so Plaintiff could not have her day in court to present the pattern of harassment and retaliation.

By the time of trial the handwriting was on the wall. Plaintiff was prejudiced in having to proceed with two isolated incidents of retaliation, which, out of the full context of the series of events, made Plaintiff's case impossible to prove. It was an impossible task for the jury to determine the impact of two isolated issues of retaliation.

There is no evidence in this case of consensual sex. Plaintiff suffered debilitating illness from the harassment which rendered her permanently disabled and unable to work. Yet Defendant argues the sex was consensual.

There were many factual matters more appropriate for a jury determination on the harassment claim, including: the alleged acts of discrimination did not constitute a consensual relationship; the evidence indicates there was a series of coerced events spread over four years; and Plaintiff was treated more harshly than Defendant's officer, McGann, who received his special retiree benefits worth millions of dollars.

Summary judgment should not have been granted on the issue whether Plaintiff's actions were reasonable in not reporting the harassment in the face of threats of retaliation. The situation in which Defendant's officer placed Plaintiff is not the type of thing one tells anyone if it is coerced. Plaintiff told no one for four years out of shame and humiliation that the harassment was happening to her. And there was evidence that when Plaintiff did attempt to approach those who should have been in position to help, their reaction was one of indifference, ineptitude, or worse.

Plaintiff did complain of the inappropriate behavior by McGann. And Plaintiff witnessed the ineffectiveness of Defendant's policy on harassment which had not been followed in her complaint against Williams. It was natural that Plaintiff believed her complaint of harassment by McGann would not be effective. When she finally did complain, McGann was not fired, even though he still received the special retirement benefits worth millions of dollars, and he only received a relative slap on the wrist by the withholding of a modest bonus. When Plaintiff finally did complain of McGann she was faced with the same ineffective response and retaliation she had witnessed.

These were sensible factual inferences a jury is so well suited to make.

At the time the harassment began, Plaintiff was four employment levels below McGann. He was the boss of the boss of Plaintiff's boss. McGann was one of most senior officers of Allstate. Plaintiff was not in a situation like one complaining against a fellow employee or an immediate supervisor. Complaining against McGann was effectively complaining to the top of the corporate pyramid for Plaintiff. Plaintiff was warned by McGann not to report the harassment to anyone and specifically not to another officer, McGann's boss, Norb Florek, Senior Vice President.

When Plaintiff did complain to her supervisor, Bahrman, of harassment by another individual, Williams, her supervisor kept it hidden from Human Resources and Corporate Security and instead reported it to McGann.

These facts presented the legitimate inference: Plaintiff's fear of retaliation for reporting the harassment was reasonable, and was not merely some generalized fear.

Who could Plaintiff complain to about McGann? A jury could infer that Plaintiff's complaint against McGann would not be adequately addressed. And the facts demonstrate that it was not. When Plaintiff did complain earlier nothing was done. When she finally complained against McGann, there was an ineffective response, and a pattern of retaliation. Plaintiff complained in September 1995 while McGann was still an employee. Defendant allowed McGann to retire November 30, 1995 with several million dollars in benefits under the Special Retirement Offer. It was not until outside attorneys became involved in the investigation in February, 1996 that McGann was 'punished' by the withholding of a relatively insignificant bonus. Defendant's response was ineffective just as Plaintiff anticipated. Summary judgment was inappropriate, and a jury should be allowed to decide the disputed facts presented on this issue.

Marge Kellen (Vice President of Tax) made phone calls to Plaintiff after McGann left Allstate, telling Plaintiff to meet McGann at a bar, and to come alone. Defendant knew that Marge Kellen, other officers, and managers were aware of or suspected the sexual harassment. Rachel Morrison was told by Plaintiff of the sexual incidents, and Morrison testified she did not get the impression Plaintiff wanted nor that Plaintiff welcomed a sexual relationship with McGann. No action was taken in regard to the failure by Morrison to report the sexual harassment. Also, Bahrman and another manager, Sichz, showed their knowledge and suspicion of the sexual harassment, including when they questioned only Plaintiff about McGann's whereabouts when he missed a Sears Corporation meeting the morning after one of the sexual incidents. Bahrman and Sichz cannot now claim they thought the relationship was consensual after Plaintiff made it clear to both of them repeatedly that McGann's behavior

both in the office and at outside company sponsored events was inappropriate and offensive. Indeed, because McGann testified that his sexual relationship with Plaintiff was not an affair, summary judgment on the issue was especially inappropriate.

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted because the lower court committed serious legal error in holding that an employee who has been subjected to an unwelcome sexual relationship with an officer of the employer in exchange for job benefits and under threat of having job benefits withheld, has not suffered an adverse tangible employment action.

The lower courts made an improper application of the *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) and *Burlington v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) decisions. The law is clear both before and after *Faragher* and *Ellerth* that an employer is strictly liable when a high ranking officer subjects an employee to an unwanted sexual relationship in exchange for favorable employment benefits. Such a change in the terms and conditions of employment causes that employee to suffer an adverse tangible employment action. Allstate should not benefit from the affirmative defense and should be held strictly liable for the actions of its officer.

In the alternative, if the affirmative defense is available to Defendant, the evidence clearly indicates that there are disputed issues of material fact. There was evidence that Allstate failed to exercise reasonable care to prevent and correct sexual harassment. There was evidence that Hetreed

attempted to take advantage of preventive and corrective opportunities and was rebuffed. There was also evidence that the preventive and corrective opportunities were ineffective.

The evidence is also clear that there was a pattern of retaliation against Plaintiff for her claim of sexual harassment.

An unwelcome sexual relationship with a subordinate by a corporate officer in exchange for favorable work benefits is a tangible employment action as a result of the sexual harassment.

This strict liability of the employer for the actions of a corporate officer does not depend on any artificial label, but depends on recognition that an unwelcome sexual relationship to receive or retain employment benefits constitutes an adverse employment action.

This is consistent with this Court's holdings in Faragher and Ellerth. The detriment to the subordinate employee caused by the officer of the employer is controlling on the issue of vicarious liability.

In this case a tangible employment action was taken against the employee. Plaintiff received favorable tangible employment benefits because of the threat by the offending officer to withhold such employment benefits. The offending officer had the power and authority to favorably affect Plaintiff's employment benefits and could extort an unwelcome sexual relationship, just as the offending officer had the power and authority to adversely affect a subordinate's employment benefits if the unwanted sexual advances were refused.

II. The Petition should be granted because the lower court committed serious legal error in holding that an employer cannot be held strictly liable for actions of an officer who demanded submission to an unwanted sexual relationship with a subordinate in exchange for job benefits (including approval of salary increases, bonuses, promotions, and favorable performance reviews).

Plaintiff produced clear evidence of sexual harassment by Defendant's high ranking officer. Plaintiff was subjected to sexual harassment and denied the tangible job benefit of being free from sexual harassment, and of not being subjected to harassment as a term or condition of employment. The very nature of submission sexual harassment is the extraction of sexual favors for a job benefit or a threat to withhold a job benefit if the employee does not submit.

Summary judgment was improperly granted on the issue of sexual harassment because of the misapplication of *Faragher* and *Ellerth*, and in some instances the trial court gave inferences favorable to Defendant where there were genuine issues of material fact. The trial court ignored evidence favorable to Plaintiff, construed evidence in Defendant's favor, and drew inferences from the evidence favorable to Defendant. There are clearly genuine issues of material fact which precluded summary judgment in favor of Defendant.

In *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) the Court held that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim. *Faragher* involved a hostile work environment situation.

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

Faragher did not change the previous rule of strict employer liability for quid pro quo sexual harassment by a supervisor, and cited *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ("When a supervisor requires sexual favors as a quid pro quo for job benefits, the supervisor, by definition, acts as the company"); *see also* Lindemann & Grossman 776 (noting that courts hold employers "automatically liable" in quid pro quo cases because the "supervisor's actions, in conferring or withholding employment benefits, are deemed as a matter of law to be those of the employer").

Burlington v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998) involved a case in which an employee refused the unwelcome and threatening sexual advances of a supervisor, yet suffered no adverse, tangible job consequences. The Court held in such a case, for the employee to recover against the employer there must be a showing that the employer was negligent or otherwise at fault for the supervisor's actions.

The Court in *Burlington v. Ellerth* stated,

> In *Meritor*, the terms served a specific and limited purpose. There we considered whether the conduct in question constituted discrimination in the terms or conditions of employment in violation of Title VII. We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit.

See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, at 77(1986) (Marshall, J., concurring in judgment) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates").

In the present case the tangible employment action against Plaintiff was being subjected to sexual acts with a superior officer as a condition of employment. Plaintiff submitted to unwelcome demands for sex by Defendant's officer because of his authority over her raises, promotions, bonuses, and terms and conditions of employment. The acts of the officer of Defendant significantly altered the terms or conditions of Plaintiff's employment.

The affirmative defense is not available when the supervisor's harassment culminates in a tangible employment action.

In its analysis of *Faragher* and *Ellerth*, the EEOC recognized that a supervisor demanding sex for a favorable employment action constitutes an adverse employment

action, the same as a refusal followed by an unfavorable employment action. The analysis in the EEOC Enforcement Guideline No. 915.002 (June 18, 1999), stated:

> If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. [*See Nichols v. Frank*, 42 F.3d 503, 512-13 (9th Cir. 1994) (employer vicariously liable where its supervisor granted plaintiff's leave requests based on her submission to sexual conduct), cited in *Faragher*, 118 S. Ct. at 2285.] Such harassment previously would have been characterized as "quid pro quo." It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands. The Commission rejects such an analysis. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant *change* in employment status; it did not require that the change be adverse in order to qualify as tangible. [*See Ellerth*, 118 S. Ct. at 2268 and *Faragher*, 118 S. Ct. at 2284 (listed examples of tangible

> employment actions that included both positive and negative job decisions: hiring *and* firing; promotion *and* failure to promote)].

The EEOC position is in conflict with the holding of the Seventh Circuit Court of Appeals. The EEOC stated its position that the *Ellerth/Faragher* affirmative defense is not available in cases in which an employee submits to a supervisor's sexual demands in exchange for tangible job benefits.

This position is consistent with the balance struck by this Court in *Ellerth* and *Faragher*. The employee who submits to the advances of an officer to retain employment benefits should not be in a worse position that the employee who refuses sexual advances and suffers a loss of an employment benefit. Both have suffered an adverse employment action. This supervisor-subordinate power differential is properly observed by imposing strict liability on the employer.

Submitting to an unwanted sexual relationship to retain employment benefits constitutes a significant change in employment status.

The lower courts misinterpreted the cases of *Faragher v. Boca Raton*, 118 S. Ct. 2275 (1998) and *Burlington Industries Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). In *Ellerth*, the Court noted that the "unfulfilled quid pro quo" (118 S. Ct. at 2263) was really a hostile environment case. (118 S. Ct. at 2265). The quoted predicate to the new affirmative defense set out in each case reads: "When no tangible employment action is taken . . ." (*Faragher*, 118 S. Ct. at 2270, and *Ellerth*, 118 S. Ct. at 2292-93). The

affirmative defense cannot be intended to apply in a case of submission to sexual harassment, such as the instant case.

The Court in *Faragher* noted that the supervisors' conduct was discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment. Certainly the facts in the present case demonstrate that the high ranking officer who coerced sexual activity in exchange for job benefits engaged in harassment sufficiently serious to alter the conditions of Plaintiff's employment.

In this case the tangible employment action against Plaintiff was her being subjected to sexual acts with her superior as a condition of employment. Plaintiff submitted to unwelcome demands for sex by Defendant's officer because of his authority over her raises, promotions, bonuses, and terms and conditions of employment. The acts of the officer of Defendant significantly altered the terms or conditions of Plaintiff's employment.

Alternatively, if the new defense applies to a submission to unwelcome sex case like Plaintiff's, there are certainly genuine issues of material fact about both elements of the defense.

As to the first element, whether "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," Plaintiff presented evidence that high-ranking agents of Allstate knew of the sexual harassment (including McGann himself) and did nothing to stop it for four years. Certainly, the conflicting views of the effectiveness and the promptness of Allstate's response or lack of response to the harassment of Plaintiff constitute

factual issues for a jury. Indeed, it seems amazing, that while Plaintiff asserts she was sexually harassed, and while McGann asserts he was sexually harassed by the Plaintiff, Allstate is still contending that Plaintiff and McGann had "a consensual sexual relationship" (Defendant's Memorandum of Law In Support of Its Motion for Summary Judgment, page 3). There seems to be a very basic factual dispute on a most important aspect of the first element of the affirmative defense.

As to the second element of the defense, whether "the Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," Plaintiff contends that it was not unreasonable to come forward with her complaint of sexual harassment at the time she did. McGann remained her superior at Allstate until January of 1995 and remained a threat to Plaintiff's employment due to his influence with other officers beyond that time. Although McGann left the Allstate premises in May of 1995, he did not officially retire until November 30, 1995. Plaintiff had good reason to delay her complaint of sexual harassment until September of 1995. Again, the reasonableness of Plaintiff's conduct presents the classic factual issues for a jury to decide.

Also there was evidence Plaintiff witnessed retaliation against other employees who complained of discrimination or who challenged officers, and when Plaintiff did complain of sexual harassment by Dave Williams, Defendant's officers violated company policy in handling her complaint.

McGann confirmed through his testimony, and documents showed, that McGann had final responsibility and authority for approval of performance reviews when Plaintiff

was a non-manager, and he continued in the chain of supervisory authority through January of 1995. Also, McGann told Plaintiff of raises, and bonuses before official announcements by Bahrman. McGann said to Plaintiff that is was time to, "up the ante", meaning more employment benefits required more sexual harassment.

III. The Petition should be granted because the lower court committed serious legal error in holding that federal law does not provides that an award of costs is part of the judgment so that a separate notice of appeal is required.

The Court of Appeals incorrectly held that it did not have jurisdiction of the order awarding costs. The provision cited to the Court of Appeals by Defendant, 28 U.S.C. § 2412 is inapplicable as it applies to cases in which the United States is a party.

Under the relevant statute, an award of costs is part of underlying judgment. Title 28 U.S.C. § 1920 on Taxation of Costs provides:

> . . . A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Also, Federal Rule of Appellate Procedure, Rule 4 does not require an amended notice of appeal for an order awarding costs. The rule spells out the specific types of motions which require an amended notice of appeal, including: judgment under Rule 50(b); amendment under Rule 52(b); for attorney's fees under Rule 54; to alter or amend the judgment, or for a new trial under Rule 59; or for relief under

Rule 60. The rule on statutory construction, *expressio unius est exlusio alterius*, applies. Where certain things are expressed in the law, an intention to exclude all others from its operation may be inferred. *See* Blacks Law Dictionary. The fact that an order for costs was not included in the list of rulings which require an amended notice of appeal supports the statutory provision that such an order is part of the underlying judgment and included in any appeal of that judgment.

This Court in *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 367 (7th Cir. 1993) held that the pendency of a motion for costs under the rule relating to an offer of judgment did not preclude the filing of a valid notice of appeal. The Court noted that a motion for costs was not a substantive motion for purposes of Federal Rule of Appellate Procedure, Rule 4(a)(4) and Federal Rule of Civil Procedure, Rule 59(e). Thus, no amended notice of appeal is required for an order awarding costs. That award becomes part of the underlying judgment pursuant to statute. The important reason that *Lentomyynti* distinguished an award of costs from a Rule 59 motion is that an amended notice of appeal is required for a Rule 59 motion, and not required for an order allowing costs.

CONCLUSION

This case presents several exceptionally important questions. In light of the conflict between the Seventh Circuit Court of Appeals decision in this case and the position taken by the EEOC in its enforcement guidelines this Court should clarify its holding in *Faragher* and *Ellerth*. It is important that this court clarify whether an employee who submits to an unwelcome sexual relationship in exchange for job benefits or to avoid a job detriment has suffered an adverse employment action.

Accordingly, Petitioner, Mary Ann Hetreed, respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED APRIL 12, 2001

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CHICAGO, ILLINOIS 60604

Submitted March 16, 2001*
Decided April 12, 2001.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

No. 00-1787

MARY ANN HETREED,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

Appendix A

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 96 C 2021.
James B. Zagel, *Judge.*

Order

After our prior opinion in this case, see *Hetreed v. Allstate Insurance Co.*, 135 F.3d 1155 (7th Cir. 1998), the district judge granted summary judgment to Allstate on two of Hetreed's claims: sex discrimination and intentional infliction of emotional distress. Hetreed's claim that her discharge was an act of retaliation for her complaints (the principal subject of the prior appeal) was tried to a jury, which returned a verdict in Allstate's favor. Hetreed appeals from the final decision.

One aspect of the appeal must be dismissed for want of appellate jurisdiction. Hetreed asks us to set aside the district court's award of costs in Allstate's favor. But she did not file a notice of appeal directed to the award of costs, which was made approximately seven months after the decision on the merits. The award of costs therefore is not before us. *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 511-12 (7th Cir. 1989); cf. *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366-38 (7th Cir. 1993).

A second issue also has not been properly presented. Hetreed contends that the district court should not have barred certain proposed expert witnesses, but her half-page argument (Br. 25) is so cursory that we cannot tell what

experts she believes should have been allowed to testify on what subjects. A litigant who wants appellate review of a subject over which the district court has discretion, and on which appellate review is deferential, see *General Electric Corp. v. Joiner*, 522 U.S. 136 (1997), must do more than simply state her disagreement with the judge's disposition, which is all Hetreed does. Because we have no reason to think that the district judge abused his discretion in the conduct of the trial, the jury's verdict must stand.

Hetreed contends that she suffered sex discrimination because a male supervisor induced her to engage in sexual relations over a four-year period between 1991 and early 1995. (Allstate believes that these relations were consensual and that Hetreed rather than the supervisor was the initiator, but given the posture of the case the district judge properly assumed that Hetreed's version is correct.) The grant of summary judgment was based on *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). These cases hold that when a supervisor sexually harasses a subordinate, the employer is not held responsible for the supervisor's acts if the employee did not suffer any "tangible employment action" and the employer demonstrates:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765. The district court concluded that Hetreed did not suffer any tangible employment action because she had received all raises and promotions that were her due, and that Allstate exercised reasonable care by putting in place a system for making complaints — a system that Hetreed did not use until half a year after the supervisor in question retired. Moreover, the court observed, when Hetreed did complain, Allstate took the only action available to it: it withheld any discretionary increase in the ex-supervisor's retirement benefits. Hetreed contends on appeal that there were material disputes of fact, but she does not identify any. Her contention that sexual relations are "tangible employment actions" is at variance with the definition given in *Faragher* and *Ellerth*, which used that phrase to refer to wages, promotions, and other acts that may be viewed as the official acts of *the employer* within the scope of Title VII (which deals with wages and other conditions of employment); a supervisor's sexual activity is not attributed to the firm unless it fails to take preventive or responsive steps within its power. Hetreed essentially disagrees with *Ellerth* and *Faragher*. She says, for example, that women should not be required to complain because of the possibility of retaliation. But if that bare possibility were enough, the defense identified in *Ellerth* and *Faragher* would be a dead letter. Retaliation, if it does occur, can be penalized. Hetreed failed to prove that retaliation ensued; an unfounded suspicion that retaliation *might* occur does not deprive an employer of the defense identified by the Supreme Court.

Two remaining arguments require only brief comment.

Hetreed contends that Allstate violated the Americans with Disabilities Act, but her brief does not explain how,

since the firm retained (and promoted) her right up until a discharge that the jury evidently determined was attributable to Hetreed's misconduct. (Our prior opinion describes the circumstances.) Hetreed does not contend that she *was* disabled; to the contrary, she says that she could perform every task. Although, as her brief contends, depression can be disabling, her brief does not relate this to any adverse action taken by Allstate.

Finally, Hetreed's objection to the district court's decision that the workers' compensation laws foreclose her state-law claims against Allstate is unavailing given what happened in the rest of the case. Hetreed wants to apply the label "intentional infliction of emotional distress" to the discrimination and retaliation of which she complains. But given that Allstate prevailed on these claims, it also would prevail even if it were possible to disregard the workers' compensation bar to state-law theories. (Hetreed's assertion that she "has a valid [state-law] claim without the allegations of sexual harassment and retaliation" (Br. 27) is unelaborated, and we do not see how such a claim could survive. See *Smith v. Chicago School Reform Board of Trustees*, 165 F.3d 1142, 1151 (7th Cir. 1999).)

AFFIRMED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 11, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 2021
Judge James B. Zagel

MARY ANN HETREED,

Plaintiff,

v.

ALLSTATE INSURANCE CO.,

Defendant.

MEMORANDUM OPINION AND ORDER

This employment dispute is as bitter as they come. Plaintiff Mary Ann Hetreed ("Hetreed") worked at defendant Allstate Insurance Company ("Allstate" or "company") in the internal audit department for nearly ten years, until she was terminated from her position as Audit Manager in May 1997. At the core of the dispute are twelve to sixteen sexual encounters Hetreed had with one of her supervisors, George McGann, from July 1991 to May 1995. According to Hetreed, none of the encounters were consensual or welcomed; according to McGann, the first was consensual but the others he participated in under threat of disclosure. Regardless,

neither of them told anyone at Allstate about the sex, except a junior employee, until September 1995 when Hetreed told Benjamin Tarver, director of Allstate's corporate security department, that she had been harassed. Starting that very day, Tarver conducted a full investigation of Hetreed's allegations, and in March 1996, the company sanctioned McGann for his conduct by not granting him a discretionary post-retirement bonus. Pursuant to the company's early retirement program, McGann had stopped working on May 30, 1995, before Hetreed complained, and stopped drawing a salary on November 30, 1995.

Allstate expressly prohibits sexual harassment, and its Human Resources Policy Guide for Management provides a four-step procedure for handling complaints. Steps 1 and 2 require that the employee report any incident of harassment to the human resources manager, or to line management, who should then inform human resources. Step 3 calls for human resources to conduct an investigation with the assistance of department management, and step 4 calls for the company to take any necessary corrective measures, which could include counseling, reprimand or dismissal. Although not outlined in the manual, Allstate requires that human resources notify the corporate security department of any complaint involving a bonus-level employee (which Hetreed was after 1992). Allstate also had a general employee grievance mechanism called the We Care program in place, although there is conflicting evidence about the program's effectiveness at handling sexual harassment complaints.

At least as early as 1992, Hetreed had a copy of the human resources policy guide. She attended sexual harassment

training in that year as well. From 1992 on, she served as manager in charge of the audit department's administrative functions and spent 90 percent of her time on human resources work. In this capacity, she headed up the 1994 internal audit of the human resources department.

In 1993, Hetreed complained to Dean Bahrman, her immediate supervisor, that a coworker, Dave Williams, was making inappropriate comments to her and that she felt sexually harassed. Hetreed states that she told no one in management about McGann's harassment during the nearly four years in which it occurred, because she thought they already knew about the relationship and because she feared retaliation.

As support for her first belief — that management already knew about the harassment — Hetreed points to a statement by Bahrman to her to: "Keep the big guy happy, no matter what it takes," and to the fact that he once questioned her about McGann's whereabouts when McGann missed a meeting. Bahrman denies having had any knowledge of the relationship, let alone the harassment. Other supervisors — Marge Kellen and Craig Barber — also deny any knowledge of the sexual encounters or the harassment and testified that they noticed nothing unusual about Hetreed and McGann's interaction.

In support for her second belief — that she would suffer retaliation if she told someone about the harassment — Hetreed points to the following incidents. First, in 1991, she asked her then supervisor, Ken Sichz, what the company would do if it discovered that an officer were having

sex with a subordinate. To which, Hetreed says Sichz replied that the company's reaction would depend on the subordinate's rank and that the company would be more likely to interfere in the case of a secretary. Second, Hetreed believes that management retaliated against another employee, Bob Biancalana, who filed a 1992 discrimination complaint with the We Care program, because he left Allstate employ in the next year. Biancalana states that he suffered absolutely no repercussions or retaliation from his use of the program and that the situation was resolved to his satisfaction. Third, when in 1993 Hetreed told Bahrman that Williams sexually harassed her, Bahrman reported the incident to McGann, his supervisor, but did not report it to human resources or to corporate security. McGann spoke to the employee's supervisor, who in turn spoke to Williams directly about the incident, which did not occur again. Fourth, in May 1995, Hetreed asked George Kashmar, the audit department human resources representative, about sexual harassment generally, and he replied that sexual harassment complaints were "nothing but a scam." Finally, in July 1995, Hetreed believes Bahrman criticized her performance unfairly and removed certain of her work responsibilities in retaliation for her challenging his decision to hire a particular employee.

Hetreed filed a complaint with the EEOC on December 29, 1995, alleging sexual harassment by McGann. On April 8, 1996, she filed suit in this court for sexual harassment by McGann, as well as retaliation by Allstate, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for what she believes was a campaign of retaliation against her that started after her September 1995 internal

complaint. On April 16, 1997, she amended both complaints, expanding her retaliation claim and charging discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

Hetreed's retaliation claim asserts that Allstate began taking adverse actions against her soon after she complained about McGann in September 1995, culminating in her termination from the company in May 1997.[1] To support this claim, Hetreed points to the following series of events. First, in the fall of 1995, Dean Bahrman informed her that she would no longer have sole responsibility for running department communications meetings. Second, rumors circulated around the company about her in January 1996, in part because a secretary in the human resources department with access to Hetreed's EEOC complaint told two non-management employees about it, one of whom passed on the information to several others. Third, in early 1996, management created a new director position in the audit department at a level between Bahrman and Hetreed and appointed Dave Williams to fill it, effective August 1996. Fourth, Hetreed's overall merit rating dropped from "Exceeds" to "Meets Expectations" on her November 1996 mid-year performance review. Fifth, Bahrman removed her from leading the 1996 internal human resources audit in December of that year at the request of the human resources department, who became uncomfortable with some of Hetreed's inquiries. Sixth, Allstate refused initially, pursuant to its policy not to compensate employees for time spent on

1. In evaluating the retaliation claim, I exclude all acts that occurred prior to September 1995 when Hetreed reported McGann's conduct to corporate security.

personal lawsuits, to pay Hetreed for time spent at a deposition it had requested in this case. Seventh, the company suspended her in February 1997, with pay, pending an investigation into a possible breach of her ethical duty as an auditor and cut off her phone and computer access during the suspension. Eighth, when issuing her suspension, two managers escorted her out of the building without allowing her time to collect her personal belongings. Finally, the company terminated her in March 1997.

Hetreed's ADA claim charges that Allstate discriminated against her by failing to accommodate changes to her work assignments and environment she requested after developing post-traumatic stress disorder, major depression, and irritable bowel syndrome. Two doctors testified that they diagnosed Hetreed with post-traumatic stress disorder, as a result of the harassment, and major depression, and that they prescribed medication to treat the disorders.

Hetreed told Dean Bahrman about her conditions at her March 1996 performance review. At that time, she told him that she could not perform unstructured tasks, citing the audit department's control self-assessment project that she had been asked to head as an example, and that she had trouble understanding his instructions. In response to these requests, Bahrman took her off the control self-assessment project and told her to tell him anytime she did not understand his instructions. Hetreed also requested that she be able to limit her hours to a normal 40-hour workweek, even though departmental changes meant that after September 1995, she did not work more than five days a week, usually from about 7:30am to 5:00 or 5:30pm. After she told Bahrman about

limiting her hours, he would reassign any work she could not finish. In August 1996, Hetreed told Bahrman that she did not want to work under Dave Williams in light of his past behavior and in January 1997, her doctor requested that she limit her time with him. To smooth Williams's transition and as a matter of course, Bahrman continued to actively supervise Hetreed and another manager through their February 1997 performance appraisals.

On October 11, 1996, Hetreed gave Bahrman an "Allstate FMLA [Family Medical Leave Act] Designation Form" designating October 4 and October 7 as FMLA absences. Attached to the form was a "Certification of Health Care Provider" form signed by Hetreed's psychiatrist, certifying her diagnoses of post-traumatic stress disorder and major depression. In response to questions posed on the form, the doctor indicated that Hetreed was not presently incapacitated, but that it would be necessary for her to work "only intermittently or to work on less than full schedule as a result of the condition." To clarify exactly what Hetreed sought, Bahrman asked her on November 8, 1996 to provide him with more information from her doctor regarding her specific needs. On January 17, 1997, Hetreed gave Bahrman an additional letter from her doctor stating that her contact with her supervisor should be restricted as much as possible. On February 11, 1997, Sammis wrote a letter to Hetreed asking for further clarification. In the letter, Sammis wrote, in relevant part:

> I note that you submitted an FMLA Certification form from your therapist in October, 1996 which indicates that you may require an intermittent

> leave of absence or other reduced work schedule for a period of one year (5.b). More recently, you submitted a letter from your therapist indicating that you are unable to work under your current supervisors, Dean and Dave Williams, because of your need for a work environment with minimal stress. Since the only type of accommodation you have ever discussed with Dean is the job assignment proposal discussed above, it is not clear to us whether you are actually seeking a leave of absence/reduced work schedule, or whether the one-year period recommended by your therapist is intended to refer to the period of time you wished to have your job duties restructured. . . . Alternatively, if what you are requesting is to have your supervisors changed, your only option is to explore other job opportunities outside the Audit Department. Under the current organizational structure of the Audit Department, there is no alternative reporting relationship available to someone at your level.

Hetreed responded to the letter in a memorandum she sent a few days later to Bahrman, in which she stated that due to what "appears to be considerable misunderstanding of both my health situation and the requirements of the Family Medical Leave Act," her attorney would communicate directly with the company.

Allstate moves for summary judgment on each of the three counts. I will grant summary judgment if, drawing all

inferences in the light most favorable to Hetreed, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). This standard should be applied "with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994).

Count I: Sexual Harassment

Hetreed's sexual harassment case against Allstate rests on defendant's vicarious liability for the discriminatory acts of one of its supervisors. Assuming for purposes of this motion that McGann's behavior constitutes actionable sexual harassment, Allstate asserts that it cannot be held vicariously liable as a matter of law as it is entitled to the affirmative defense recognized by the Supreme Court in *Burlington Indus., Inc. v. Ellerth*, __ U.S. __, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. 2275 (1998). Allstate believes it is entitled to the defense because Hetreed suffered no tangible employment action as a result of the alleged harassment, and both elements of the defense are satisfied, *i.e.* (1) Allstate exercised reasonable care to prevent and correct any sexual harassment, and (2) Hetreed unreasonably failed to take advantage of the preventive and corrective opportunities provided by the company or otherwise to avoid harm. *See Faragher*, 118 S. Ct. at 2292-93; *Ellerth*, 118 S. Ct. at 2270.

Hetreed counters that Allstate is not actually entitled to the affirmative defense, because it is available only in cases

of hostile environment sexual harassment, not to the *quid pro quo* harassment she asserts she suffered. The defense is not limited in that way. In *Ellerth*, the Supreme Court stated that the terms *quid pro quo* and hostile work environment are still helpful when there is a threshold question whether a plaintiff can prove actionable discrimination. *See* 118 S. Ct. at 2265. If discrimination is assumed, however, as it is here, the Court stated explicitly that it is "the factors we discuss below, and not the categories *quid pro quo* and hostile work environment, [that] will be controlling on the issue of vicarious liability." *Id.*

Hetreed next argues that Allstate is not entitled to the affirmative defense because she did, in fact, suffer a tangible employment detriment as a result of the harassment: she had to endure repeated, coerced sexual encounters with her boss in return for "reasonably appropriate future evaluations, compensation (including bonuses and pay raises), responsibilities, and other job-related treatment." Hetreed's argument in essence is that because she submitted to McGann's sexual advances only because of his ability to affect the terms and conditions of her employment, having to endure the harassment itself constituted an employment detriment. But, that is not the balance the Supreme Court struck in *Faragher* and *Ellerth*. Rather, it recognized the effects of the supervisor-subordinate power differential but rejected it as reason to apply automatic liability, *see Ellerth*, 118 S. Ct. 2269, choosing instead to allow employers the affirmative defense in cases where no tangible employment action is taken. Thus, the harassment itself does not constitute tangible employment action; there must be something more.

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A tangible employment action is one that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 118 S. Ct. at 2268. It requires an official act of the enterprise, a company act, and in most cases inflicts direct economic harm. *See id.* at 2269. Hetreed did not suffer any sort of negative repercussions from Allstate or McGann as a result of the harassment; to the contrary, she received promotions and bonuses throughout her time there, and her ultimate termination was unrelated to the harassment itself. Accordingly, Allstate is entitled to assert an affirmative defense to its liability for McGann's harassment.

To prevail at this stage, Allstate must prove each element by a preponderance of the evidence on the material undisputed facts. *See Faragher*, 118 S. Ct. at 2279. On the first element, Allstate points to the preventive and corrective action it took with regard to sexual harassment, in general, and Hetreed's case, in particular. The company had a detailed sexual harassment policy in place at all relevant times, notified its employees of the program, provided managers (including Hetreed) with manuals outlining the policy and with sexual harassment training. It also points to the immediate corrective action it took in Hetreed's case as soon as it had actual notice: it launched an investigation the same day, ensured that McGann and Hetreed had no further contact, and elected not to give McGann a discretionary bonus, one of the only ways it could punish a retired employee.

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Hetreed asserts that there are genuine issues of material fact as to the reasonableness of Allstate's preventive and corrective action. Specifically, while she does not dispute the existence of the policies and the training, she in effect argues that they were ineffective in practice because management didn't follow the procedures when she complained about Williams in 1993. She also asserts that the corrective action taken by the company was ineffective first, in light of the fact that high-ranking officials must have known of the sexual harassment at a much earlier date (and McGann himself definitely did), and second, that Allstate could have punished McGann more severely.

First, I find that Allstate's anti-harassment policies are sufficiently structured, detailed, and publicized to constitute a reasonable preventive measure. While the mere existence of a policy is not enough to establish adequate preventive action, there is no evidence in the record to indicate that this one was ineffective. Hetreed's evidence that Bahrman strayed from the letter of the policy when addressing her complaint about Williams is not enough to create a genuine issue of material fact as to the reasonableness of the preventive measures, when management acted promptly to meet with the subject of the complaint and the behavior ceased thereafter.

Notwithstanding the existence of policies themselves, if management had actual knowledge of the harassment prior to September 1995 and failed to take appropriate action, it would not satisfy the first element of the affirmative defense. Hetreed presents no evidence of actual knowledge of the harassment, however. At best, her evidence (the comments and questioning by Bahrman) builds a circumstantial case

that Bahrman suspected McGann and Hetreed of having a sexual relationship. Knowledge of a sexual relationship between two managers is not the same as actual knowledge of sexual harassment. I also refuse to impute McGann's actual knowledge of his actions to Allstate, as doing so would render the affirmative defense moot.

Finally, when Allstate did gain actual knowledge of the harassment in September 1995, it acted immediately to investigate Hetreed's allegations fully, to insure that McGann and Hetreed had no further contact, and to punish McGann. Thus, the first element of the affirmative defense is satisfied as a matter of law.

To prevail on the second element, Allstate must prove that Hetreed acted unreasonably in not reporting the harassment until she did. The company argues that given the anti-harassment policies in place, Hetreed's actual knowledge of them at least as early as 1992, her familiarity with human resources due to her specific responsibilities within the audit department and the training she received, and her professional access to managers due to her own high rank within the company, it was unreasonable for her to wait more than four years to tell someone about McGann's actions towards her. I agree.

Hetreed counters that a jury could find her decision not to keep quiet reasonable, in light of her evidence that management "must have known" about the sexual relationship and her fear that she would suffer retaliation if she spoke up. If Hetreed did believe that other managers knew about the sexual relationship, it is unreasonable for her to

believe that they definitely knew it was unwanted on her part. Also, in light of her knowledge of the mechanisms in place to handle sexual harassment complaints, it was unreasonable for her to rest on this belief, rather than affirmatively to tell someone. Finally, as a matter of law, her fear of retaliation, even if credited, is not a valid reason for not reporting the harassment, for it prevents the defendant company from taking corrective action. *See Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) ("generalized fears [of retaliation] can never constitute reasonable grounds for an employee's failure to complain to his or her employer" because doing so would eviscerate affirmative defense). Thus, as Hetreed did not act reasonably in waiting four years to report the harassment, the second element of the affirmative defense is established.

Accordingly, I grant Allstate's motion for summary judgment as to count I.

Count II: Retaliation

In her retaliation claim, Hetreed asserts that Allstate took a series of actions against her after she complained about McGann's conduct, each of which adversely affected her ability to perform her job and which, taken together, constitute evidence of retaliation. Under Title VII, it is unlawful for an employer to discriminate against an employee because she has made a charge under the subchapter. *See* 42 U.S.C. § 2000e-3(a). A plaintiff may prove a violation by presenting direct or indirect evidence of discriminatory intent. *See Oates v. Discovery Zone*, 116 F.3d 1161, 1169-70 (7th Cir. 1997).

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As Hetreed has presented no direct evidence that Allstate acted with discriminatory intent, she must proceed under the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Under this well-established formula, to defeat the defendants' motion for summary judgment, Hetreed must establish a *prima facie* case of discrimination by a preponderance of evidence.[2] Specifically, she must show: (1) that she engaged in statutorily protected expression, *i.e.* reporting or otherwise opposing conduct prohibited by Title VII; (2) that she suffered an adverse employment action after or contemporaneous with the protected activity; and (3) that there is a causal link between the two. *See Pafford v. Herman*, 148 F.3d 658, 670 (7th Cir. 1998). If she does this, Allstate must offer "evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *Oates*, 116 F.3d at 1170 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 2748 (1993)). The burden then shifts back to Hetreed to demonstrate that the company's proffered explanation is merely a pretext for retaliation. *See id.*

Allstate concedes that Hetreed has satisfied the first prong of the *prima facie* case, but argues that she fails on the second, because none of the cited incidents, except the termination, constitutes a negative employment action. Adverse employment actions are defined broadly in this Circuit, *see Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996), but must materially affect the employee's job.

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2. Hetreed argues that each of these incidents are direct evidence of retaliation. They are not, but I am considering them as indirect evidence.

See Rabinovitz v. Pena, 89 F.3d 482, 489 (7th Cir. 1996). While an adverse action is not limited solely to loss or reduction of pay or monetary benefits, *see id.* (citing *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir. 1987)), neither does it include everything that makes an employee unhappy. *See Smart*, 89 F.3d at 441.

With respect to the pre-termination treatment, Hetreed's argument is that Allstate took a series of antagonistic and adverse steps against her that over time materially disadvantaged her. The Williams promotion by itself rises to the level of material adversity, because placing an individual, whom Hetreed had previously accused of sexual harassment and with whom she wanted no contact, in the position of her immediate supervisor arguably would make it much more difficult for her to do her job.[3] Additionally, being removed from the human resources audit and the suspension both adversely affected her employment. The human resources audit incident hurt her, because by putting her in a position in which she had a serious and blatant conflict of interest and then stripping her of that appointment when she made routine inquiries, Allstate damaged Hetreed's professional credibility. Likewise, suspension under suspicion of misappropriation of documents would have damaged the professional reputation of a senior auditor.

By contrast, the remaining actions cited by Hetreed — the spreading of information by non-management employees,

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3. This would not be true in every case, however, and I do not mean to suggest that it is always impermissible for a person to be supervised by an individual against whom he or she once lodged a complaint.

the company's initial refusal to pay her for time spent at her deposition, the November 1996 performance review, and forcing her to leave the office immediately pending her suspension — simply are not adverse actions, even when viewed as part of the whole. First, absent evidence that management instructed the secretaries to leak information about Hetreed's claim or knowingly disregarded an established pattern of such conduct, the disclosures cannot be imputed to the company. Second, as it is undisputed that the company ultimately allowed her to use paid time to attend her deposition in this case, its initial refusal simply does not constitute an adverse action. Third, as the lower performance rating that Hetreed received on her November 1996 mid-year review did not affect her responsibilities or compensation, and especially in light of the high rating she received on her two other post-complaint reviews (her November 1995 mid-year and March 1996 annual review), I find that it did not affect her adversely. *See Rabinovitz*, 89 F.3d at 488-89. Fourth, forcing Hetreed to vacate the premises immediately after issuing her suspension did not adversely affect her ability to perform her job; the suspension itself did that.

For the four adverse actions taken by Allstate — the Williams appointment, removal from the human resources audit, the suspension and the termination — Hetreed still must establish a causal link between her complaint and the company's acts. To satisfy this element, she must demonstrate that Allstate would not have taken the adverse action "but for" the protected expression. *See McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 483 (7th Cir. 1996). A telling temporal sequence, in which the employer's adverse action follows fairly soon after the employee's protected

expression, can establish the required nexus. *See Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 1998). Hetreed first complained to Tarver in September 1995, filed her EEOC complaint in December 1995, and filed this lawsuit in April 1996. Each of the incidents happened within a year of the filing of the lawsuit, and most within a year after she filed her EEOC complaint. While the causal connection could be more immediate, in light of Hetreed's ongoing complaints about her harassment, I find that the time is not so distant as to preclude a reasonable inference that Allstate's actions were linked to Hetreed's complaint.

The burden thus shifts to Allstate to present legitimate, non-discriminatory reasons for each of its actions, which Hetreed must then demonstrate are pretextual. With regard to the Williams appointment, Allstate asserts that Williams was the only qualified employee available to fill the position. According to Bahrman, the position was created as a developmental one, in order to "bring somebody in from another area that would give that individual an opportunity to see and develop business knowledge about other specific operating areas in the company." As evidence of pretext, Hetreed points to evidence showing that Williams was the only one interviewed for the position and that several other members of the auditing department thought the appointment surprising because Williams had no auditing experience. As it is unusual for a company to place an employee with no auditing experience in a supervisory position over a management-level employee with eight years of auditing experience, and it is undisputed that Bahrman knew about Hetreed's history and present concerns about Williams at the time of the appointment, Hetreed has satisfied her burden in this case.

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Allstate explains its actions with regard to the human resources audit as follows. It trusted that Hetreed would not allow her personal issues to interfere with her work, and that it was only after she breached that duty by making what it considered to be inappropriate inquiries that it transferred her off the audit. Specifically, it considered her request for listings of ledgers on special retirees to be so far outside the scope of the audit as to actually be a terminable offense. Hetreed presents evidence that that was a routine inquiry in such an audit. In light of Allstate's questionable judgment in placing her on the audit in the first place, that is enough to satisfy her burden to show pretext.

Allstate says it suspended Hetreed pending the investigation of her request for information about fees the company paid to the law firm it had hired to defend itself in the instant suit, as well as her decision to give the fee information to her personal attorney. When Hetreed would not provide an immediate explanation — whatever the reason why — the company suspended her, with pay, pending the outcome of the investigation. It is reasonable for a company with reason to doubt the ethics of one of its high-ranking auditors to deny that person access to company files while it investigates. Hetreed has presented no evidence to cast doubt on Allstate's stated reason for the suspension, and thus fails to satisfy her burden to show pretext.

Finally, Allstate states that it terminated Hetreed after conducting its internal investigation into the breach, hearing her testimony at the March 7, 1997 preliminary injunction hearing, and because of additional documents she produced at the hearing. Hetreed testified that in requesting the fee information, she was "doing the company a service by

making sure they were using competent counsel." She also produced a copy of the 1995 version of something called the "3000 ledger," a general ledger of fees paid by Allstate, which Allstate says she should not have taken off company premises. According to Allstate, it fired her for abusing her privileged position to access and disclose confidential information, and for lying about it under oath and during an internal investigation. Hetreed argues that Allstate was wrong to terminate her because her actions actually were reasonable and justified. Unfortunately for Hetreed, her disagreement with Allstate's business judgment about what constitutes unethical behavior on the part of its auditors is not the issue. *See Hetreed v. Allstate Ins. Co.*, 135 F.3d 1155 (7th Cir. 1998). Hetreed has presented no evidence that Allstate's reasons to terminate her were pretextual, or that the company has or would have excused similar lapses by an employee who had not filed suit against the firm. *See id.* at 1157-58. As such, she has not satisfied her burden.

Accordingly, I grant Allstate's motion for summary judgment on count II in part and deny it in part.

Count III: ADA Failure to Accommodate

Hetreed contends that Allstate discriminated against her in violation of the Americans with Disabilities Act ("ADA") for failing to reasonably accommodate her disability. Title I of the ADA proscribes discrimination against a "qualified individual with a disability" because of said disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *See* 42 U.S.C. § 12112(a) (1994). To overcome

Allstate's motion for summary judgment, Hetreed must show that there is a genuine issue of material fact with respect to whether she is disabled, whether she is a qualified individual, and whether Allstate knew about the disability and failed to reasonably accommodate her. *See Baert v. Euclid Beverage Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998); *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147, 1151 (7th Cir. 1998).

Allstate's first argument is that Hetreed is not disabled under the ADA, which defines "disability" as (a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Hetreed asserts that she is disabled under subsection (a) because she suffers from medically diagnosed post-traumatic stress disorder (PTSD) and major depression,[4] which substantially limit her ability to work.

While Hetreed's recent medical diagnoses are enough to show that she suffers from a mental impairment for ADA purposes, they are not enough alone to establish a substantial limitation on her ability to work. *See Hoeller v. Eaton Corp.*, 149 F.3d 621, 625 (7th Cir. 1998) (diagnosed bipolar affective disorder not disability under ADA because no substantial limitation on employment generally); *Patterson v. Chicago Assoc. for Retarded Citizens*, 150 F.3d 719, 725-26 (7th Cir. 1996) (diagnosed paranoia not disability

4. Plaintiff also asserts, based on her own testimony, that she has been diagnosed with irritable bowel syndrome. That testimony alone is insufficient to establish that she suffers from a physical impairment under the ADA. Further, she fails even to argue how that condition, even if proved, would affect her ability to work.

under ADA because no substantial limitation on employment generally). Rather, being substantially limited in the major life activity of working requires that a person be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i); *Patterson*, 150 F.3d at 725. An inability to perform a particular job for a particular employer is not sufficient; rather, the impairment must substantially limit employment generally. *See id.*

Allstate points to Hetreed's own testimony that her impairments imposed only moderate limitations on her daily activities and imposed no appreciable limitations on her ability to work as an auditor and argues that she is not substantially limited in her work. That argument misses the mark, however, for Hetreed's testimony with regard to her ability to work was based on her ability while medicated, and she expressly said she did not know what would happen if she was taken off the medication. This distinction is important, because the Seventh Circuit has instructed that in assessing the impact of an individual's impairments on his or her major life activities, I am to examine the extent of the impairment without regard to the availability of mitigating measures such as medicines. *See Baert*, 149 F.3d at 629.

It is Hetreed's burden to come forward with facts sufficient to show that she could meet her ultimate burden of showing an ADA-recognized disability, *see DePaoli v. Abbott Lab.*, 140 F.3d 668, 671 (7th Cir. 1998), which in this case means showing that without her medication, her mental conditions substantially limit her ability to work either

at Allstate or as an auditor generally. *See Patterson*, 150 F.3d at 725-26 (plaintiff's complete inability to work at her present teaching job due to her mental illness did not substantially limit her ability to work generally, because she could teach non-special educational students at a different school). The problem is that Hetreed has presented no evidence on this point. Neither of Hetreed's treating doctors, Drs. Lammers and Kepler, expressed an opinion as to the effect Hetreed's illness, if left untreated, would have on her ability to work.[5] Dr. Conroe, who is defendant's expert, confirmed the diagnosis of major depression and discussed general symptoms of the illness, which can include a difficulty to focus on work or daily activities and the impairment of a person's judgment and ability to make decisions, but did not discuss Hetreed's ability to work. Hetreed herself testified that there are no work-related auditing activities that she could not do as a result of her illnesses and that she simply did not know what would happen were she to stop taking the medication.

While I recognize that it is difficult for Hetreed to prove what effect her untreated illness would have on her ability to work, it is possible to do so either by showing her symptoms before she went on medication (or between

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5. In fact, Dr. Kepler said nothing about the effect of Hetreed's illnesses on her capacity to work. Dr. Lammers testified that Hetreed was not incapacitated, assuming a definition of incapacity as "an inability to work." While he did answer "yes" to a question on Hetreed's FMLA form inquiring whether she would need intermittent time off due to her illness, when asked in January 1997 to clarify any accommodations she required, he recommended only that her exposure to her supervisor be limited.

regimens) or through medical testimony, and that is what the ADA requires. Hetreed simply has not done this. I find that she is not disabled under the ADA, and therefore is not entitled to its protections.[6]

Accordingly, I grant Allstate's motion for summary judgment on count III.

Conclusion

For the foregoing reasons, I grant summary judgment for Allstate on counts I and III in their entirety and on count II in part.

ENTERED:

s/ [copy]
James B. Zagel
United States District Judge

DATE: 5/11/99

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6. I note, in the alternative, that even if Hetreed is disabled under the ADA, she has not established a genuine issue of material fact as to Allstate's failure to reasonably accommodate her needs. She did not work on the control self-assessment project, she did not have to work more than five days a week or evenings and Bahrman reassigned work she was unable to do to help make sure that that happened. Allstate engaged in a process to clarify her request to limit her exposure to her supervisor, which it reasonably decided could only be accommodated by moving her out of the department, *see Weiler v. Household Finance Corp.*, 101 F.3d 519, 526 (7th Cir. 1996), and it is Hetreed, rather than Allstate, who cut off that interactive process in her memorandum to Bahrman in February 1997.

Supreme Court, U.S.
FILED
SEP 12 2001

(2)

No. 01-77

IN THE
Supreme Court of the United States

MARY ANN HETREED,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states the following:

Allstate Insurance Company ("Allstate") states that it is an insurance carrier providing coverage in states nationwide. Allstate is a subsidiary of The Allstate Corporation. Allstate's subsidiaries include: Allstate Fire and Casualty Insurance Company, Allstate Holdings, LLC, Allstate Indemnity Company, Allstate Insurance Company of Canada, Allstate International Inc., Allstate Life Insurance Company, Allstate New Jersey Holdings, LLC, Allstate North American Insurance Company, Allstate Property and Casualty Insurance Company, Allstate Texas Lloyd's, Inc., General Underwriters Agency, Inc., The Northbrook Corp., and Ivantage Group, LLC.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Mary Ann Hetreed was employed by Respondent Allstate Insurance Company in its Audit Department from 1987 to 1997. In 1991, she began a four-year sexual relationship with George McGann, Petitioner's second line supervisor. During the course of their sexual relationship, McGann was promoted to the lowest level of vice president at Allstate, one of more than fifty. During that period, Petitioner also received evaluations, salary increases and a promotion, which she admits were deserved and recommended by (and could not have been approved without the support of) her direct supervisor, Dean Bahrman. Like all bonus-eligible employees, Petitioner's annual bonus was determined by Company and department performance.

In September 1995—four years after the sexual relationship began and more than three months after McGann retired from Allstate—Petitioner first reported their sexual relationship to Allstate management. Although she claimed that the relationship was not consensual, Petitioner's description of the events of their relationship indicated to the contrary (*e.g.*, Petitioner gave McGann a gift wrapped box of condoms, bought him "sex toys" from her catalog, and invited him into her home when her husband was out of town). There is no evidence that any person in management (other than Petitioner and McGann) was aware of their sexual relationship before September 1995.

In response to Petitioner's complaint, Allstate commenced an investigation the same day. Allstate did not conclude that Petitioner had been sexually harassed, but it did determine that McGann showed poor judgment by entering into a consensual sexual relationship with a subordinate. Because McGann had already retired, Allstate's only available sanction was to withhold payment of McGann's discretionary bonus in March 1996. Petitioner's suggestion that this sanction was minor or that Allstate could legally have withheld retirement benefits from McGann has no basis in the record.

In April 1996, Petitioner filed a complaint in federal court alleging *quid pro quo* sexual harassment and other claims. Petitioner claimed that for four years, she secretly submitted to sexual advances by McGann out of fear that he would use his authority to withhold deserved evaluations, raises and/or promotions. Following this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the district court granted summary judgment on Petitioner's sexual harassment claim and most of Petitioner's other claims. In its decision, the district court assumed that Petitioner had presented evidence of actionable sexual harassment, but found that her

alleged submission to McGann's sexual demands was not the kind of tangible employment action contemplated by this Court in *Ellerth* to impose strict vicarious liability on Allstate. Accordingly, the district court applied the affirmative defense established in *Ellerth* and *Faragher* and granted summary judgment to Allstate on the bases that: (1) Allstate had in place anti-harassment policies and a reporting mechanism of which Petitioner was aware; (2) there was no evidence beyond Petitioner's bald opinion that the reporting mechanism was not effective; (3) Allstate investigated Petitioner's complaint and took appropriate and effective action; and (4) it was objectively unreasonable for Petitioner to wait four years (and three months after McGann retired) to report the alleged harassment.

In February, 2000, following a trial on the two remaining retaliation claims, the district court entered judgment in Allstate's favor on all of Petitioner's claims. On March 27, 2000, Petitioner timely filed a Notice of Appeal of the order entering the jury verdict and the order granting summary judgment. Subsequently, on June 28, 2000, the district court announced its award of costs to Allstate and thereafter entered judgment on that award on November 9, 2000. Petitioner did not file a separate notice of appeal of the costs order or amend her earlier notice of appeal to include an appeal of the costs judgment.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because the questions presented do not meet any of the criteria set forth in Supreme Court Rule 10 for granting review by this Court. The decisions below present neither a conflict among the circuit courts, nor a departure from the accepted and usual course of judicial proceedings. Indeed, Petitioner does not cite to a single case contrary to the decisions below. Instead, she asks this Court to review the lower court's fact-bound consideration on summary judgment

and its application of settled law to the facts in this case, in direct contravention of the standards for review set forth in Rule 10. In so doing, Petitioner substantially misstates the facts, taking advantage of this Court's rule not requiring specific citations to record evidence in the petition. Petitioner's arguments are unsupported by appropriate authority and do not present a suitable issue for review by this Court. Accordingly, her petition for a writ of certiorari should be denied.

RESPONDENT'S BRIEF IN OPPOSITION

I. PETITIONER'S SEXUAL HARASSMENT CLAIM (QUESTIONS 1 AND 2)

Petitioner presents two questions based upon the Seventh Circuit's determination that summary judgment was appropriate on her sexual harassment claim. Both questions address the same issue: whether the Seventh Circuit "committed serious legal error" by holding that Petitioner's alleged submission to sexual advances by a supervisor, based upon an alleged threat that he would withhold deserved job benefits, does not subject Allstate to strict, vicarious liability (Pet. 7, 9). Petitioner fails to demonstrate that there is any confusion in the lower courts about the application of the recently announced standard for review of sexual harassment claims set forth by this Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). She simply disputes the lower court's determination, under the peculiar facts of this case, that she failed to present evidence of a tangible employment action and failed to present a genuine issue of material fact to dispute Allstate's proof in support of its affirmative defense.

In *Ellerth* and *Faragher,* this Court eschewed the traditional *quid pro quo* and hostile environment analyses for claims arising under Title VII of sexual harassment by a supervisor in favor of a clearer standard for strict, vicarious

liability to the employer based solely upon whether the plaintiff can show a "tangible adverse employment action" "result[ing] from a refusal to submit to a supervisor's sexual demands." *Ellerth*, 524 U.S. at 753-754. In those cases where a plaintiff can show the requisite tangible employment action, the employer is held strictly liable. However, where the plaintiff can show actionable harassment, but no tangible employment action, the employer can assert an affirmative defense to liability based upon the following factors:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

In creating this clearer "tangible employment action" standard, the Court disfavored imposing strict liability based upon ambiguous evidence of unrealized threats or an employee's secret submission to sexual demands. Thus, this Court expressly defined a "tangible employment action" as "requir[ing] an official act of the enterprise, a company act . . . [which] in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Ellerth*, 524 U.S. at 762. The Court made clear that this standard should be construed consistent with the "material adverse employment action" standard applied to all other Title VII claims. *Ellerth*, 524 U.S. at 761. *See also Savino v. C.P. Hall Co.*, 199 F.3d 925, 932 n.8 (7th Cir. 1999); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 n.5 (6th Cir. 2000). Only "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

decision causing a significant change in benefits"—each of which "in most cases inflicts direct economic harm"—meets this standard. *Ellerth*, 524 U.S. at 762.

Petitioner makes two arguments in support of her petition. First, she relies on a pre-*Ellerth* definition of *quid pro quo* sexual harassment to argue that the Seventh Circuit misapplied *Ellerth* and *Faragher* because those decisions "did not change the previous rule of strict liability for *quid pro quo* sexual harassment by a supervisor" (Pet. 10). Second, Petitioner argues that, to the extent *Ellerth* and *Faragher* did change the standard to require more than an unrealized threat of withholding job benefits, the lower court misapplied that standard because Petitioner's alleged submission to the sexual advances of her supervisor constitutes a tangible employment action (Pet. 11).

Petitioner's first contention is patently wrong because this Court in *Ellerth* expressly directed that "the categories quid pro quo and hostile work environment will [*not*] be controlling on the issue of vicarious liability. . . ." *Ellerth*, 524 U.S. at 745 (emphasis added). Similarly, Petitioner's second argument has no merit because no court has held that submission constitutes a tangible employment action. Only two circuit courts have discussed whether an employee's secret submission to the sexual demands of a supervisor constitutes a tangible employment action for the purposes of imposing strict liability under *Ellerth* and *Faragher*. Both rejected Petitioner's argument. The Seventh Circuit in this case held in an unpublished decision that sexual relations are not a "tangible employment action" under *Ellerth* and *Faragher*, noting that those cases "used that phrase to refer to wages, promotions, and other acts that may be viewed as official acts of *the employer* within the scope of Title VII (which deals with wages and other conditions of employment); a supervisor's sexual activity is not attributed to the firm unless it fails to take preventative or responsive steps

within its power." (Pet. App. A, page 4). The Tenth Circuit applied the same reasoning in rejecting a similar claim in its unpublished decision in *Coker v. Ball Janitor Service, Inc.*, 208 F.3d 225, 2000 WL305487 at *3-4 (10th Cir. March 24, 2000) (affirming summary judgment for employer on sexual harassment claim). *Accord Watkins* v. *Professional Security Bureau, Ltd.*, 1999 WL 1032614 at 3 (4th Cir. Nov. 15, 1999) (declining to find tangible employment action where plaintiff presented facts that she submitted to unwelcome sexual advances). Thus, there is no conflict among the circuit courts as to the standard for a "tangible employment action" for the purpose of applying the affirmative defense under *Ellerth* and *Faragher*.

Petitioner cites to no contrary precedent. Petitioner's only authority is a non-binding EEOC Guidance that disagrees with the balance struck by this Court in *Ellerth* and *Faragher* (Pet. 13). Petitioner cites to no case in which a court has adopted or followed the EEOC Guidelines, nor are such agency guidelines entitled to deference because they are contrary to the law. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (invalidating EEOC ADA regulations).

Although Petitioner did not present it as a separate question for consideration before this Court, she devotes significant attention in the petition to the lower court's determination that she failed to present a genuine issue of material fact on Allstate's affirmative defense. Petitioner does not contend that the lower court applied an incorrect standard or that its decision creates any conflict or ambiguity in the law. Instead, she asserts only that the lower court erred in its application of the settled law to the facts in this case (Pet. 7, 9). This Court need not get embroiled in a detailed analysis of the extensive factual record in this case because the very nature of Petitioner's challenge, *i.e.*, that the lower court made "erroneous factual findings," is precisely the kind of asserted error that Supreme Court Rule 10 rejects. Moreover, the factual dispute

asserted by Petitioner relates to whether she was reasonable in failing to complain about the alleged harassment because she feared retaliation. The lower court recognized that if Petitioner had presented specific evidence to support her alleged fear of retaliation, that could, under appropriate circumstances, preclude summary judgment on the second prong of the affirmative defense. But, it found that Petitioner presented no such evidence and granted summary judgment accordingly. Petitioner's request for review of this factual determination does not, therefore, present a substantial federal question warranting this Court's review.

II. PETITIONER'S FAILURE TO TIMELY APPEAL THE AWARD OF COSTS (QUESTION 3)

The Petition for a Writ of Certiorari on the Seventh Circuit's determination that it lacked jurisdiction to decide Petitioner's appeal of the judgment awarding costs to Allstate should be denied because the decision is consistent with the well-established interpretation of Rule 4 of the Federal Rules of Appellate Procedure. The Seventh Circuit and other circuit courts have consistently held that where, as here, a court enters a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure on the merits and subsequently enters a separate final judgment on the award of costs, the award of costs is separately appealable and "a separate notice of appeal is necessary . . . ." *Weilgos v. Commonwealth Edison Co.*, 892 F.2d 509, 511 (7th Cir. 1989). *See also Lentomuynti Oy v. Medivac, Inc.*, 997 F.2d 369, 367 (7th Cir. 1993). *Accord Barr v. Nat'l Conference of Bar Examiners*, 182 F.3d 931, 999, 1999 WL 317547 at * 4 (10th Cir. May 20, 1999) (appeal of costs judgment dismissed for lack of jurisdiction because Rule 4 of the Federal Rules of Appellate Procedure requires the appellant to file a separate notice of appeal to appeal the judgment on an award of costs entered after the original notice of appeal of the judgment on the merits).

Petitioner cites no authority contrary to the Seventh Circuit's decision below. She offers only her own interpretation, based in part on a misrepresentation of the holding in *Weilgos*, to argue that the costs judgment merges into the judgment on the merits for the purposes of filing a notice of appeal pursuant to Rule 4. To the contrary, the Seventh Circuit has unambiguously held for at least the past twelve years that the costs award does not merge into the judgment on the merits and that a separate notice of appeal must be filed. Thus, Petitioner's argument is contrary to the settled interpretation of the requirements of Rule 4. Because there is neither an ambiguity nor a conflict in the law, Petitioner's incorrect assertion that the lower court misapplied the settled law does not present an appropriate question for this Court's review.

CONCLUSION

Neither the questions presented nor the arguments made by Petitioner meet the standards set forth in Rule 10 for review by this Court. Petitioner cites to no conflict in the law or ambiguity among the lower courts that requires clarification. She instead asks this Court only to review the Seventh Circuit's application of the law to the specific facts of this case, which is not the function of this Court. Wherefore, Respondent Allstate Insurance Company respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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